

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE**

Robson Xavier Gomes

v.

Civil No. 20-cv-453-LM
Opinion No. 2020 DNH 085

US Department of Homeland Security,
Acting Secretary et. al.

O R D E R

On May 18, 2020, the court held a hearing on petitioners' emergency motion for relief regarding 8 civil immigration detainees whom respondents intended to transfer out of Strafford County House of Corrections (SCHOC) on May 19, 2020. Doc. no. [122](#), as amended by doc. no. [131](#). The court also heard arguments on petitioners' emergency request for an injunction halting further transfers of ICE detainees into the SCHOC. Doc. no. [132](#).

I. Petitioners' Requests Regarding 8 Transfers out of SCHOC

On May 14, petitioners submitted an emergency motion (doc. no. [122](#)) seeking the following injunctive relief:

- 1) require respondents to disclose specific information prior to transferring ICE detainees from SCHOC; and
- 2) prevent ICE from transferring any ICE detainees to any other facility for non-removal purposes; or
- 3) give each detainee a bail hearing prior to transfer.

On May 16, after a detainee at SCHOC tested positive for COVID-19, the first confirmed case for an inmate at the facility, petitioners filed two additional motions. First, petitioners filed a motion seeking discovery about the detainee who tested positive and SCHOC's contact tracing, testing, and quarantine capacities. Doc. no. 133. Prior to the May 18 hearing, respondents rendered that motion moot by disclosing the requested information.

Second, petitioners filed an addendum to their request for emergency relief as to the 8 detainees being transferred out of SCHOC. Doc. no. 131. In light of the positive COVID-19 test, petitioners withdrew their request that ICE not transfer any detainees to other facilities for non-removal purposes because some detainees may prefer to be transferred out of the facility. Petitioners added requests for injunctive relief and requested the following order:

A. When ICE intends to transfer a class member for non-removal purposes, ICE shall provide the following information to Petitioners' counsel 72 hours prior to transfer to ensure that the class member's rights are protected: (i) where ICE intends to transfer the detainee, (ii) whether that facility has confirmed COVID-19 cases among staff or detainees, (iii) whether the transferred individual will be housed in single or congregate cells in that facility, (iv) the percentage capacity of the facility and whether it is significantly less than the current capacity at the SCDOC, and (v) whether the detainee has any indication in his or her entire ICE medical file reflecting medical vulnerability according to the Court's May 4,

2020 criteria (see Docket No. 52) in determining medical vulnerability and, thus, entitlement to bail hearings; and

B. For any detainee who ICE intends to transfer for non-removal reasons, any such detainee shall be provided an immediate bail hearing before this Court prior to transfer;

C. ICE should not transfer any detainee for any reason before that detainee receives a test for COVID-19 infection and provides the negative outcome of the test to the Court, even where bail has been denied for the detainee. If an individual declines to be tested, then the individual may be moved so long as it is compliant with ICE internal protocols; and

D. Any detainee released by ICE in its discretion or by this Court on bail shall be given an immediate test for COVID-19 at ICE's expense. If there is a positive test, the detainee should be immediately transported to a nearby hospital where the detainee can receive appropriate medical care at ICE's expense.

Paragraph A

With respect to petitioners' request in paragraph A, respondents agreed during the hearing that at least 48 hours before a detainee from SCHOC is transferred to another facility, they will inform petitioners:

- 1) Which field office and, if known, which facility the detainee will be transferred to;
- 2) Whether any facility under the authority or within the jurisdiction of the field office has any confirmed COVID-19 cases among those who work or are detained at the facility and, if so, which facility and how many COVID-19 positive individuals are present;
- 3) The percentage capacity of the transferee facility at the time of transfer—or facilities operated by the field

office at the time of transfer—and how that percentage compares to the capacity at SCHOC at the time of transfer; and

- 4) Whether there is any indication in a detainee's medical record that the detainee is medically vulnerable.

Respondents are unable to provide some of the additional information that petitioners requested. For example, respondents cannot inform petitioners whether a transferred detainee will be housed in a single or congregate cell because that information is not known until a detainee reaches the receiving facility. Respondents also assert that ICE does not maintain any sort of cumulative medical records for detainees in its custody. Surprisingly, ICE does not transfer medical records from one facility to another when detainees are transferred. When a detainee is transferred into SCHOC, while this case is pending, the court encourages respondents to ask the sending facility to transfer any detainee medical records that are in the custody or control of ICE or the sending facility.

Although respondents argued that petitioners could discover COVID-positive data from ICE's "confirmed cases" coronavirus website, see <https://www.ice.gov/coronavirus>, petitioners asserted that the website is not up to date and only includes data about ICE employees. Thus, the website does not include information about employees that work at a facility like SCHOC

because those employees work for Strafford County as opposed to ICE. Indeed, as of May 19, 4 days after a medical records administrator at SCHOC tested positive for COVID-19, and three days after a detainee tested positive, SCHOC was still not listed on the ICE website as a facility with a confirmed case of COVID-19. On May 20, the ICE website stated one detainee at SCHOC had tested positive for COVID-19 but the website did not indicate that a staff member who works at SCHOC had also tested positive. Counsel for respondents agreed to inquire whether additional information may be available about the presence of COVID-19 at receiving facilities from other sources. If additional information is available, respondents agreed to disclose this information to petitioners.

Paragraphs B & D

In light of respondents' agreement to make the above information available, petitioners withdrew their request in paragraph B that all detainees receive bail hearings prior to transfer. Petitioners also withdrew the request in paragraph D that all detainees released from SCHOC by ICE or the Court be tested for COVID-19. Petitioners will renew these requests on a case-by-case basis as deemed necessary.

Paragraph C

This leaves petitioners' request that ICE:

[N]ot transfer any detainee for any reason before that detainee receives a test for COVID-19 infection and provides the negative outcome of the test to the Court, even where bail has been denied for the detainee. If an individual declines to be tested, then the individual may be moved so long as it is compliant with ICE internal protocols.

Doc. no. 131 at 5. At the time of the hearing, respondents were reluctant to agree to test all detainees prior to transfer because tests might not be available and there was a possibility of false negatives. Counsel for respondents agreed, however, to inquire with SCHOC and ICE about the possibility of testing detainees before ICE transfers them to a new facility. Respondents agreed to update the court and petitioners regarding that issue.

The court appreciates that, up until two weeks ago, the limited number of COVID tests in New Hampshire may have restricted SCHOC's ability to test incoming or outgoing detainees. However, in the last two weeks, more COVID-19 tests are available and anyone experiencing symptoms or anyone who falls into a higher risk category due to age, medical condition, or other risk factor—such as health care workers or long-term care facility workers—may also be tested. See

<https://www.wmur.com/article/get-coronavirus-test-new-hampshire/32479184> (last accessed May 19, 2020 at 4PM).

As the court noted in the May 14, 2020 order, living in a congregate setting such as SCHOC places detainees at a higher risk of being infected with COVID-19. See doc. no. 123 at 9. Medical experts from the Department of Homeland Security have warned of a “tinderbox scenario” in ICE detention centers where the virus could spread rapidly once introduced. See doc. no. 5-2 at 4-6; see also doc. no. 5-3 at 4. Just a few days ago, on Saturday, May 16, 2020, an ICE detainee coming from a facility with known cases of COVID-19 was not tested prior to being transferred to SCHOC and now has become the first detainee at SCHOC to test positive for COVID-19.

The court appreciates that it may not be possible to test everyone in New Hampshire for COVID-19 at this time. However, SCHOC has three known cases of COVID-19 within the facility (two detainees and one employee) and it is unknown at this time whether additional individuals within the facility may also have COVID-19 because there has not been widespread testing within the facility. Transferring detainees without first confirming they are COVID-negative is unnecessarily risky to the detainee, those transferred alongside the detainee, and the receiving facility.

In light of these public health risks, the court is hopeful that respondents will reassess the situation and decide to test SCHOC detainees before transferring them out of SCHOC and into a new facility. However, this decision is one best left to respondents. The court is not persuaded it has the authority to order that ICE perform these tests.

II. Request to Halt Transfers into the SCHOC

In response to the detainee testing positive for COVID-19, petitioners filed an emergency motion asking the court to stop respondents from transferring ICE detainees into SCHOC until the court resolves petitioners' pending motion seeking the same relief. Doc. nos. 132 and 7. At the hearing, petitioners modified this request slightly and no longer seek to exclude short-term "airlift" detainees from entering the facility.¹ Petitioners argue this relief is necessary in order to prevent detainees with COVID-19 from entering SCHOC and endangering class members. Petitioners further argue that it is necessary to stop new detainees from entering SCHOC in order to improve the facility's ability to implement social distancing by

¹ "Airlift" detainees are only in the facility for 4 or 5 days and spend their entire stay in quarantine. See doc. no. 123 at 21.

decreasing—or at least not increasing—the population at SCHOC. Doc. no. 7.

The court recognizes that a limited number of courts have issued preliminary injunctions enjoining ICE from transferring detainees into detention facilities. See, e.g., Savino v. Souza, No. CV 20-10617-WGY, 2020 WL 2404923, at *11 (D. Mass. May 12, 2020). But see Roman et al. v. Wolf et al., 20-00768 TJH (C.D. Cal. April 23, 2020), Preliminary Injunction ¶ 1 (“Adelanto shall not accept any new detainees”), rev’d 2020 WL 2188048, at *1 (9th Cir. May 5, 2020) (staying this portion of the preliminary injunction).

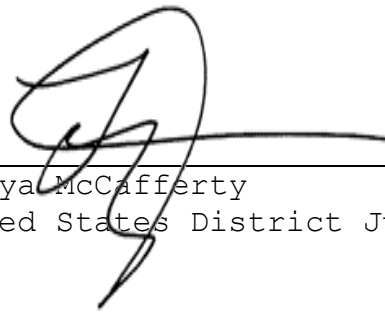
At this point, on this record, petitioners have not persuaded the court either that it has the authority to place a judicial blockade on the doors of SCHOC or that such relief is necessary. Thus, the court denies without prejudice petitioner’s emergency request for a preliminary injunction halting transfers into SCHOC.

CONCLUSION

For the reasons stated above, and on the record during the May 18, 2020 hearing, the court grants in part and denies in part petitioners’ motion for relief with regard to the 8 detainees to be transferred out of SCHOC. Doc. no. 122. The

court denies petitioners' request for a preliminary injunction halting detainee transfers into SCHOC without prejudice. Doc. no. 132. Petitioners' request for discovery is moot. Doc. no. 133.

SO ORDERED.



Landya McCafferty
United States District Judge

May 21, 2020

cc: Counsel of Record.